Meeting in the Aisle: Lawyers as Legislative Leaders

Barry Vickrey, University of South Dakota School of Law

Available at: https://works.bepress.com/barry_vickrey/4/
South Dakota's State Senate leaders are lawyers whose advocacy in public service often means turning face-to-face and meeting in the aisle during the Legislative session. Majority Leader David L. Knudson (R-Sioux Falls) and Minority Leader Scott N. Heidepriem (D-Sioux Falls) were interviewed in May by Dean Barry R. Vickrey. Excerpts are provided on the following pages. Read the complete interview at www.usd.edu/law/.
VICKREY: The 2007 Legislature, and especially the Senate, seemed to get better reviews and, in reality, seemed to work a lot better than any Legislature I’ve seen. As a lawyer, I’d like to have the legal profession take credit for how well the Senate works since both of you are prominent lawyers. Is that fair? Can we take the credit?

KNUDSON: Scott and I will always take the credit, however undeserved; we would be delighted.

VICKREY: Did you see ways as you were working in the Legislature that the fact that you were lawyers made a difference – your education, your experience, anything specifically that you saw that really had an effect on your work?

HEIDEPRIEM: I think we expect, as lawyers, to be held to a higher standard in terms of one’s integrity and word. I think we were both surprised to end up in the positions that we are in, but as we worked through the session it was important that neither of us questioned the word of the other, and also the idea that neither of us would surprise the other. I think that “gotcha politics” is practiced elsewhere in the world, and maybe elsewhere in Pierre, but I don’t think it was in the State Senate.

I can’t think of a single time, Barry, in the entire session, when something happened on the floor that I hadn’t at least some inkling from Dave about, good, bad or indifferent. We tried to alert one another, and I think that’s a part of the trust-building process.

KNUDSON: I think that lawyers have some advantages in the Legislature. One, you are just more familiar with the subject matter that you are dealing with, the passing of laws. I think that, to me, the other thing that really distinguishes lawyers from people in an awful lot of other professions is that it’s a very adversarial world that lawyers inhabit and you get used to having friendships above adversarial proceedings. You understand that you can separate the professional, whether you are acting as a lawyer or a lawmaker, side of your life from the personal side. I think that in 2007 the Sutton hearing was an important test early on. I think that the important thing was to have decorum, give both sides a sense that they had a fair shot at explaining their position on things. Scott certainly had more trial experience – a huge number, approaching infinity – than I do, and that was very helpful. He and I sat side-by-side during that hearing, and it was very helpful to have somebody who had trial experience sitting as vice chair of that committee.

VICKREY: Most people would have guessed that the Sutton hearing would have destroyed or at least cast a negative shadow over the rest of the Session, and it almost seemed to do the opposite. The fact that you got through that with decorum, with dignity, seemed to set up the rest of the session for a more cooperative endeavor.

KNUDSON: Yes, I don’t know that it was a big positive, but I think we certainly minimized the negative side of things. I think that it was a situation where it was very hard to see how anybody came out better off, although I think the Senate process came out better off. I think we were viewed as an organization, a group of people that ultimately listened very carefully to the testimony. There were nine members on our committee, but virtually every member of the Senate sat throughout the whole of that hearing, so Senate members took their responsibility very seriously. I think everybody wished that they didn’t need to do that, but I do think that senators took the duty seriously and discharged it well. There was a partisan tinge to the vote, but it wasn’t something that embittered people at all during the session.

VICKREY: You two are sort of polar opposites in the private practice of law: one a litigator representing individuals, the other a corporate transactional lawyer. There are strong stereotypes that fit those two roles. Do those roles define you as persons or as legislators? Can you see something about yourselves that’s different because you, Scott, are a trial lawyer and you, Dave, are a transactional lawyer?

KNUDSON: He’s a better speaker.

HEIDEPRIEM: I was just going to say, I don’t think Dave gives up anything when it comes to the battle on the floor of the Senate as an advocate. It’s interesting to me, though, we both ended up in these leadership positions where a year before I had no plan of ever running for the Legislature again, and Dave has referred to his ascension as majority leader, and then all of a sudden we find ourselves creating a process that had never been created in South Dakota before to accommodate the Sutton hearing. Now you would think that that would be something on which I would have the laboring oar and Dave would not. In fact, the opposite was true, and I can think of a couple of occasions in which I said, Dave, I don’t think you should use A, B and C; you should X, Y and Z. And he would say, well, thanks, I’ll think about that, but I think I will use A, B and C. And invariably he was right, he was able to control the proceedings. Imagine further that you have a makeshift courtroom, a quasi-legislative, quasi-judicial function, with some of the most spirited, adversarial trial lawyers in the state. You have Mike Butler, Pat Duffy and Jim McMahon. But there were a couple of times when during a break we’d have a sidebar – they’d be standing in front of us – and they’d be going at it and Dave would have to insist on decorum. The amazing thing to me is that we survived that no worse for wear. It easily could have been a very destructive experience, but it was not, I don’t think. And it just showed that the Senate was in good hands, I hope.
HEIDEPRIEM: Imagine further, Barry, into negativity. Helped to keep the debate from spiraling of conduct, and I think that the speeches and I gave were seriously policy-oriented, tone and tenor of the speeches that Scott gave a speech favoring censure, and no one else spoke. And everybody thought and probably many people continue to believe that we had just arranged that, but I don’t think that there were two people more surprised that nobody else got up than the two of us.

HEIDEPRIEM: When the session started, when that part of the session started, we again exchanged notes not to surprise one another, and I said how many people do you have who are going to speak? And I think you thought you had several. And I said, we’ve probably got three as well, and in the end, there were just two speeches given and everyone else just sort of sat there.

KNUDSON: Right, Senator Nancy Turbak, lawyer from Watertown, had made several good suggestions about process, looking forward to an ethics code and some fine-tuning of our procedures should we ever have to do this again, and I actually made reference in my speech that I anticipated Senator Turbak was going to talk to us about this. She had talked to me about her suggestions, and they were good ones. So we were totally surprised. The tone and tenor of the speeches that Scott and I gave were seriously policy-oriented, trying to apply the facts to the standard of conduct, and I think that the speeches helped to keep the debate from spiraling into negativity.

HEIDEPRIEM: Imagine further, Barry, that we were sitting in judgment in this case with absolutely no standards of proof. Lawyers are used to thinking, and certainly appellate courts and appellate advocates, are used to thinking in terms of: is this clear and convincing evidence, is this a preponderance of the greater weight of the evidence, what is it? It’s whatever it seems like.
me of a childhood spent there. I am very fortunate in that way to have had a mentor like him. And I was very fortunate that he was alive when I returned to the legislature as a member in my own right. In both the House and the Senate for those eight years, and my earlier life as a Republican, he was there and really was a very steady hand and continued to emphasize the importance of putting the public first. My dad was the kind of lawyer who did farm tax returns and tried murder cases. They don't make them like that anymore.

I am working on a book right now about a famous murder case he had involving a woman named Marilyn Fire; this was one of the first “burning bed” defenses that the judge allowed in the country. George Wuest, who was later the chief justice of the Supreme Court, was on the trial bench, and dad wanted to introduce pictures of the defendant’s bruised body before she ended the life of her tormentor, who, at the time of the killing, was unconscious. And Justice Wuest, then Judge Wuest, allowed it in, and I’ll never forget it. I was 12-13 during that case and dad had just been defeated for the State Senate in 1968 by Harvey Wollman. Marilyn Fire shot Virgil Akin about three weeks after the election; dad was asked to take the case, and he did. In those days a court appointment paid nothing; tragically, it’s bad now, but it was worse then, and it was a very good role model for me.

**KNUDSON:** I think in politics, for me, Don Bierle would probably be the person I modeled myself after. Again, I see Don as embodying the attributes of a good legislator. One of the ironies is that throughout his lifetime, Don primarily represented the Avera Health System in its prior incarnations and I have been closely associated with Sanford Health throughout my legal career in its various forms. So for a while after I became a lawyer we would periodically see one another on Avera/Sioux Valley kinds of issues, but I always felt Don had the interests of South Dakota at heart. Then, probably, Bill Janklow would be, I suppose, the second public servant personality that I was close to. Again, Bill probably does fit the “often in error, never in doubt” model, but Bill had many, many positives, had high negatives as well, but he was always striving to fix things, to make life better. He was not motivated by personal gain at all, so I think he was a good model as well.

**VICKREY:** You talked earlier about integrity and being able to respect each other’s integrity. What other ethical principles have you found particularly important as you have served as legislators? We have a whole body of ethical rules as lawyers, but what ethical principles have been particularly important to you as legislators?

**KNUDSON:** I think far, far and away the most important is honesty. Nothing irritates folks in leadership positions any more than to have somebody tell us one thing and do another. And I think that’s true just in all your dealings in committee and just in talking with people, explaining bills; we have these very thick bills, very hard to go through page by page kind of thing. I know Scott formerly was on the National Conference of Commissioners on Uniform State Laws (NCCUSL) and I’m currently on that, so one of the doubtful duties of being on the NCCUSL is that you sponsor their bills. I would go to Scott and he would say, well these are model acts, I don’t know of any radioactivity here. You just have to have that trust that somebody’s not just going to put something in front of you and say, be a co-sponsor, when they know there is a time bomb lurking there.

**HEIDEPRIEM:** My dad, when he would give a closing argument, always talked about what he called the South Dakota rules, the three rules. And I use them now in my closings and I try to apply them in the Legislature. He said there are three simple rules – they aren’t always easy but they are simple to understand. Always tell the truth, treat others the way you would want to be treated, and when you make a mistake, admit it. The third one is pretty hard for politicians. I remember the bill on the smoking ban this year: I hadn’t been close to the debate and I read something and I thought, well this is obvious, and I got up and said something, and I think it was Dave who was kind enough to point out to me that I had completely misconstrued the bill. So I got up and confessed my error. That’s not easy to do. You have to do it. There are all sorts of opportunities in the legislative process to do that one. One that Dave alluded to it, when you make a commitment to someone, whether it’s a lobbyist, a lawmaker, or a constituent, and if you change your mind, you need to have the strength of character to be confident about the mind change and then you have to inform the person you had previously informed that you are going to change the way you vote.

**VICKREY:** Lawyer legislators have a particular ethical problem that other legislators may not have, and that is that you have clients who have interests, and sometimes those interests may not match up perfectly with the political interests that you are supposed to, or think you are supposed to, advocate. How do you deal with a client who might be trying to influence you on a legislative matter? How do you maintain distance if you need to from groups that you might be affiliated with?

**KNUDSON:** On rare occasions when a bill has been very narrow and it has impacted a client that I do a lot of work personally with, I have not voted on those. You can simply be absent, walk off the floor for that debate. If I am voting on an issue that, again, is typically of an industry-wide nature and I have very close associations with somebody in that industry, I will
frequently refer to that in my remarks on the floor so that people know. So it’s kind of a disclosure standard that I use most of the time and then again, in those narrow cases where it really won’t impact anybody but a client that I have a significant relationship with, I normally would try to just get off the floor and not vote.

HEIDEPRIEM: It occurred to me when I first started this that the advocacy is nearly identical in a trial and on the floor of the Legislature. The difference is in trial the effect is on your one client and it’s dramatic and life-changing. In the Legislature the effect is on all three-quarters of a million South Dakotans and maybe it’s just a little bit, and maybe it’ll never be felt, but it’s sort of a macro vs. micro view of the effect of your advocacy.

VICKREY: Let me ask you the "Profiles in Courage" question. As an elected representative, are you supposed to advocate for your constituents’ views even if you disagree with them, or were you elected to do what’s right even if you know a majority of your constituents would disagree? How do you handle that dilemma?

KNUDSON: I think you have to be true to your own vision of what is right and certainly your thinking is influenced powerfully by the views of your constituents. But on a moral issue, I think you just have to vote the way you personally feel.

HEIDEPRIEM: I agree with that. I would say that on matters that one feels passionately about, you just can’t violate that. There are other issues on which you are less passionate and probably more amenable to the feelings of a majority of people in your district or in your state, even if you are sort of inclined to be against it. I think we’ve all done that before.

KNUDSON: As well, it’s very hard to tell what a majority of people in your district think about a given issue.

VICKREY: Let me ask you a couple of questions that might be of interest to persons who are lawyers who might be thinking about being legislators. One concern is how to maintain a practice while off in Pierre in the legislative session. How do you do that? Are you able to do it because you are in firms where other people pick up the work for you while you’re gone or are you just here 25 hours a day on the weekends? How do you keep things going while you’re in the legislative session?

HEIDEPRIEM: We are both lucky in that we’re in law firms that have great people. I don’t know this and it would be interesting to get Dave’s reaction, but I suspect when your practice is made up of institutional clients they are used to working with a team. Dave heads the team, but others can carry the water while he is gone and they all understand that it’s important work that he is doing. It is hard for me because my relationships are with clients. Just like Dave was saying, it is usually just a one-time experience I have with that client who has a big problem that needs to be dealt with and doesn’t always understand why I’m not there to deal with things. So it’s hard for me to do that, to keep those balls in the air. But I am very fortunate to have a good group of lawyers.

KNUDSON: I think Scott’s right. With an institutional client, they are more used to a variety of people working on their issues, so I really have always been pleasantly surprised how little hassle it has been. Certainly, with the advent of email, I read my email several times a day during the session.

HEIDEPRIEM: He reads it on the Senate floor when I’m talking.

VICKREY: Only when you’re talking?

HEIDEPRIEM: Only then.

KNUDSON: Actually I don’t read it on the Senate floor. But swatting the tennis balls across the net, easy answers, just keeping something moving, you can do from Pierre. You get home in the evening on a Friday. Saturday morning you’re doing a political cracker barrel kind of thing. Saturday afternoon I think almost everybody goes to their offices, whether a lawyer or some other activity in real life. You spend your Saturday afternoons at the office. Sunday noon, you head back to Pierre. So weekends are pretty compressed. We are going to a four-day legislative week for most of next year, so it will be very interesting to see how that works. But I think that having people who can take up the slack is clearly the key. I have been very fortunate that not too many legal things have required my personal involvement during the legislative session.

HEIDEPRIEM: I would say to lawyers reading this who are interested or wondering about serving in the Legislature, I truly believe that serving in the Legislature makes you a better lawyer in private practice, in just a variety of ways. There are all kinds of areas of law that you otherwise wouldn’t think about. It just makes you more well-rounded, I think, in terms of your practice.

KNUDSON: I would agree. I think it is a very broadening experience. I also think that if you encounter a problem that you need to interface with government officials on, you probably know some of the people and they have a desire, hopefully, to give you a call back just from your present or past service in the Legislature. I think you also get to meet a lot of people who know information on particular subjects. So I know that if I’ve got an issue that relates to wind energy, these are the folks I ought to at least call and get some names from or recommendations from. People like myself in a business practice, my wife would argue, you’re pretty insulated from real life in many respects. In the legislature, you get a better sense of what the public at large is thinking and how they are reacting to today’s events.
HEIDEPRIEM: I do have an announcement. A great occasion upon which to make an announcement.

VICKREY: I want to have a little fun now. Both of you have been rumored as potential gubernatorial candidates, and of course, given how influential the USD Law School’s magazine is, this would be a great occasion upon which to make an announcement.

HEIDEPRIEM: I do have an announcement to make. I have extended the position of Lieutenant Governor to Dave Knudson.

VICKREY: And, Dave, have you accepted that?

[Long pause.] HEIDEPRIEM: I am waiting for an answer. Any day now. You know, I would say this, Barry, it is no secret that Dave and I both thought about that and probably continue to think about it. You can wonder why and the answer is, at least I think in our case, we tend to think in terms of big ideas. We were both influenced by Bill Janklow. I mean he was the governor when I first came to the legislature and we were doing things like ETSI, railroads and closing universities. Big ideas. I think you can divide the governors in South Dakota into two categories: those who have been presiding officers essentially, and those who’ve grabbed the state by the nape of the neck and drug it into the future. Dave and I both were fortunate to have had the experience of being around one of those. There have been a few others, but I think it’s the idea of having the chance to really take big ideas and mesh them with the State we love very much that motivates us.

KNUDSON: Al McGuire used to be the commentator on college basketball games and there would be 22 seconds left and his favorite phrase was “that’s an eternity” and certainly between now and 2010 you have an eternity. But I think that if you’re driven to try and fix problems, to make change, to improve life for citizens of South Dakota, you certainly look at what’s the best platform or vehicle to do that from and so you try and keep options open.

VICKREY: In 2010, what are the challenges and opportunities that the next governor will be facing? What sort of things do the two of you see on the horizon for the next governor?

KNUDSON: You probably have to have a burst of optimism to think that we’re going to have solved the school funding issue. K-12 education is, in terms of funding, going to be an issue. I think also just the whole question of whether the education system from preschool on up to post-graduate education fits the twenty-first century. Are we teaching people in a way that they can genuinely learn? I think you’ve got a whole bunch of issues there. And then you have the issue of Medicaid, which is just a growing chunk of South Dakota’s budget and sort of crowds out the resources which might otherwise be available for other more innovative programs. So somehow figuring out how we deal with health care for our lowest income citizens is a real challenge. Again, maybe there is a federal role for that. But I think health care and education, to me, are the two areas that are certainly not going to be solved between now and 2010.

HEIDEPRIEM: Three statistics that I think will be as true 36 months from now as they are now: we have the poorest paid teachers in the country, we have the highest percentage of two-income earner households in the country; we have the fastest growing prison population in the country. All three of those reflect a failure to invest in the future. We have the resources now to strategically invest in the future. Every time we do that we lessen the need to build another prison, we increase the ability of a family to provide for its children, and we improve the education for our kids. The failure to do that sets us back every year. We have a K-12 funding system that ensures failure in terms of the future. We insist that K-12 funding will grow by 3 percent or the rate of inflation, whichever is less, and I am preaching to the choir here, because Dave and I are of one mind on many of those issues and we will be working very hard on them next year in the session, and hopefully beyond that.

KNUDSON: Today’s “Argus Leader” reported that the Sioux Falls School District has sort of revamped their pay structure. I think, according to the SFEA person, 80 percent of the teachers liked this. I think they did make some dramatic changes on increases in compensation. The business manager tells us that our taxes are less than last year based on a same-value house. But I think in the end, Scott and I vary on speed and perhaps how fast the house is burning. I think that is an issue between us as well.

HEIDEPRIEM: Well said, Nero. The fact is that in this state we are sitting on an embarrassment of riches, a huge opportunity, and a lack of political will to apply those riches to the opportunity. The challenge for the next generation of leadership is to do exactly that.

VICKREY: Every census, the power of Sioux Falls increases, and it will happen again after the 2010 census. How will it
HEIDEPRIEM: Dave’s perspective and mine are a little different, I think, because of the 12 years I spent actually as a professional in a small town in South Dakota. We both grew up in relatively small towns, although Miller is tiny compared to Yankton, and my perspective will always be that of rural South Dakota. I can’t shake it. It’s just, I’m hard-wired that way. I often say that my software may be Sioux Falls but the mainframe is all Miller. It’s so interesting to hear Dave talk about the optimism/pessimism scale. It’s amazing to me that the people in the Millers of this state remain as optimistic as they are. In spite of their experiences and evidence to the contrary, they continue to be hopeful. I can remember when the Department of Revenue’s sales tax report would come out quarterly, and if we held our ground compared to the last quarter, it was a cause for celebration. We live in a city where on Saturday mornings now, for fun – Susy says this is an old guy thing to do – but I get a cup of coffee and drive the perimeter of the city with my jaw on the floor, amazed at how it continues to explode. It’s so foreign to my mainframe again. I tend to think that a lot of the differences are rural and urban, and there are clearly marked differences in the Legislature resulting from the lack of understanding, from a lack of really being in the shoes of someone who is a part of Sioux Falls’ driving engine of economic progress, or being in the shoes of someone else. And I think we’re equally committed to breaking down those barriers. 2013 is going to be a fascinating time, not just because of the growth in Sioux Falls, but Rapid City as well. And it may even be an urban legislature after redistricting for the census of 2010.

KNUDSON: It’s hard to believe there won’t be at least four more Black Hills and Sioux Falls seats between those two areas.

VICKREY: As successful lawyers, you’ve had opportunities to observe the legal profession from inside and then as legislators. What are we doing well or could we be doing better as lawyers in South Dakota? Do you feel good about the legal profession? Has it changed much in your time as a lawyer?

HEIDEPRIEM: That’s a very interesting question because I think most non-lawyers permit their opinion of our profession to be framed by watching national issues. Although if you ask them, the one constant that they trust in their life is their lawyer, if they have one, and they think highly of that person. But so many times I run into people who have permitted their perspective of what I do every day to be tainted by the excesses that they see nationally, and that’s regrettable. I don’t know how you overcome that except you just keep working at it and you just keep saying, well, that’s not the way it is in South Dakota, and it really isn’t the way it is in South Dakota. Many of the problems plaguing the rest of the country we are fortunately free of. I am so proud to be a lawyer and always have been. Of course, I can’t remember a time when I didn’t think this is what I would do.

KNUDSON: I am probably a poor person to ask that question of, because in my professional life I really have very limited relationships with South Dakota lawyers. I would say that much of my practice is on transactions where the other side is typically a large law firm outside of South Dakota, so probably being a legislator is what brings me more in contact with lawyers in South Dakota than my professional life. I have been very impressed with the folks that have come before committees, particularly on the Judiciary Committee, where I have served for five years. I have been impressed with the lawyers who have testified before us. I will give a brief commercial: I think Tom Barnett does just a wonderful job for the South Dakota State Bar in terms of advocating positions, serving as a resource to folks who want to know what the law really says on this issue or who they can talk to. But I have been impressed with the lawyers whom we’ve seen, whether they are lobbyists, legislators or testifying in the legislative process. I think it’s been a strong group.

VICKREY: I think we’ll end on that note. Thank you both very much.

Read the complete interview at www.usd.edu/law/.